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November 9, 2015

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of Contract Action Against Insurer—Jury Finding of No Breach and No Award of Damages.

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- Witnesses—Privileges—Attorney-Client Privilege—Scope—School District Client—Former Nonparty Employees.

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Agriculture—Farm Labor Contractors—License—Necessity—Agent—Liability for Agent’s Failure to Obtain License—Knowing Use of Unlicensed Contractor—Failure to Verify Whether Contractor Licensed.

Whether in this class action for violation of the Farm Labor Contractor Act, chapter [19.30 RCW](#), an entity that was paid a fee to manage all aspects of farming an apple orchard, including hiring workers and making all planting and harvesting decisions, was a “farm labor contractor” required to have a license under the act, and if so, whether two companies who contracted with the unlicensed contractor to manage the orchard are jointly and severally liable under [RCW 19.30.200](#) for “knowingly” using an unlicensed contractor’s services when they did not know the contractor was unlicensed but failed to inspect the license or verify whether the contractor was licensed.

No. 91945-3, *Saucedo, et al.* (appellees) v. *John Hancock Life & Health Ins. Co., et al.* (appellants).

Certified from U. S. Court of Appeals, Ninth Circuit.

No. [13-35955](#) (9th Cir.).

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Animals—Dogs—Liability for Attack—Statutory Provisions—Strict Liability—Exception—Lawful Application of Police Dog—Bite Against Police Officer.

Whether a police dog was “lawfully applied” for purposes of avoiding strict liability for a bite under [RCW 16.08.040\(2\)](#) where the dog while working on an active crime scene bit a police officer who was also working on the scene.

No. 91761-2, *Bryent and Patricia Finch* (petitioners) v. *Thurston County Sheriff’s Office, et al.* (respondent).

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**Attorney and Client—Malpractice—Criminal Defense Lawyer—Elements—
Innocence of Underlying Crime—Exception—Uncorrected Sentencing Error.**

Whether a plaintiff must prove his actual innocence in order to pursue a malpractice action alleging that his lawyers' negligent failure to act after an appellate court remanded for resentencing caused him to serve a longer sentence, and whether an exception to the actual innocence doctrine applies if the sentence the plaintiff served was within the standard range and not beyond what could lawfully be imposed.

No. 91567-9, *Piris* (petitioner) v. *Alfred Kitching, et al.*, (respondents).

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***Condominiums—Declaration—Amendment—Statutory Provisions—Voting Percentage—Ninety Percent Requirement—Change in Uses to Which Units Are Restricted—“Uses”—Scope—Leasing**

Whether an amendment to a condominium association's declaration limiting the number of condominium units that may be leased at any one time changed the “uses” to which units were restricted, requiring approval of 90 percent of the voting owners of the association pursuant to [RCW 64.34.264\(4\)](#) of the Washington Condominium Act.

No. 91247-5, *Bilanko* (respondent) v. *Barclay Court Owners Ass'n* (appellant)

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***Constitutional Law—Freedom of Speech—Begging—Time, Place, and Manner Restriction—Place Restriction—Highway On and Off Ramps—Traditional Public Forum—Content Neutrality.**

Whether a city of Lakewood ordinance prohibiting persons from “begging” (asking for money or goods as charity) on highway on and off ramps violates First Amendment free speech rights.

No. 91827-9, *City of Lakewood* (respondent) v. *Willis* (petitioner).

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Counties—Joint Self-Insurance Agreement—Assignments—After Loss—Prohibition.

Whether a county and its employee were precluded from assigning any claims they might have against a county risk pool self-insurance program (formed under chapters [48.62](#) and [39.34 RCW](#)) and its commercial insurers, where the risk pool's joint self-insurance liability policy and interlocal agreement contained nonassignment provisions and the commercial insurers issued "following form" policies.

No. 91154-1, *Wash. Counties Risk Pool, et al.* (respondents) v. *Clark County, Wash., et al.* (petitioners). (See also: [Statutes—Construction—Counties—Joint Self-Insurance Agreement—Contracts—Insurance—Liability Policy—Duty to Defend](#)).

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***Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.**

Whether in a prosecution for first degree premeditated murder the trial court erred in failing to suppress the defendant's custodial confession to detectives on the basis that his statements were involuntary and were procured in violation of the defendant's right to counsel, and because the defendant was not promptly brought before the trial court for a preliminary appearance.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant's Attempt to Seek Treatment—Admission Conditioned on Admission of State's Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

***Criminal Law—Confessions—Voluntariness—Information Required by Jail Authorities as a Condition for Receiving Safe Housing—Gang Affiliation Documentation—Right of Confrontation—Harmless Error.**

Whether in a criminal prosecution against multiple defendants, statements of gang affiliation made by the defendants in a jail's gang documentation forms, which are intended to prevent rival gang members from being housed together for their safety, constituted involuntary statements inadmissible at trial, and whether their admission violated the codefendants' confrontation rights, and if so, whether admission of the forms was harmless.

No. 91185-1, *State* (respondent) v. *Anthony Deleon, Ricardo Deleon, and Octavio Robledo* (respondents). (*See also* [Criminal Law—Punishment—Sentence—Outside Standard Range—Aggravating Circumstances—Gang Activity—Proof—Generalized Gang Evidence—Admissibility—Harmless Error.](#))

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***Criminal Law—Domestic Violence—Evidence—Other Offenses or Acts—Prior Acts of Domestic Violence—Lack of Victim Recantation—Admissibility.**

Whether in a prosecution for unlawful imprisonment in connection with domestic violence, the defendant's history of domestic violence against the complaining witness was admissible under [ER 404\(b\)](#) as evidence the witness was constrained without consent even though the witness did not recant her allegations against the defendant.

No. 91771-0, *State* (respondent) v. *Ashley, Jr.* (petitioner).

[187 Wn. App. 908 \(2015\)](#)

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Criminal Law—Evidence—Hearsay—Right of Confrontation—Statement of Nontestifying Codefendant—Redaction—Sufficiency—Name Replaced With “The First Guy.”

Whether in a felony murder prosecution the defendant’s constitutional right to confront witnesses against him was violated by the admission at trial of a nontestifying codefendant’s out-of-court statements that had been redacted to replace the name of the defendant with “the first guy.”

No. 91438-9, *State (petitioner) v. Fisher & Trosclair (respondents)*.

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***Criminal Law—Hearsay—Prior Inconsistent Statement—Other Proceeding—Statement Given to Police.**

Whether in a criminal prosecution a witness’s written statement to police signed under oath and inconsistent with the witness’s trial testimony was admissible at trial as a statement that was not hearsay because it was given “at a trial, hearing, or other proceeding” within the meaning of [ER 801\(d\)\(1\)\(i\)](#).

No. 91669-1, *State (respondent) v. Otton (petitioner)*.

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Criminal Law—Homicide—Felony Murder—Robbery as Predicate Felony—Accomplice—Affirmative Defense—Lack of Knowledge Codefendants Were Armed and Planned a Robbery—Jury Instruction—Necessity—Evidence in Support.

Whether in a felony murder prosecution predicated on the commission of robbery the trial court erred in failing to instruct the jury on the defendant’s claimed affirmative defense that she lacked knowledge that her codefendants were armed and planned a robbery. *See* [RCW 9A.32.030\(1\)\(c\)](#).

No. 91438-9, *State (petitioner) v. Fisher & Trosclair (respondents)*.

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Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application.

Whether [RCW 10.95.020](#) fails to sufficiently narrow the class of defendants eligible for the death penalty so as to prevent random and arbitrary imposition of the death penalty.

No. 88086-7, *State* (respondent) v. *Gregory* (appellant). (*See also*: [Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.](#))

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***Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.**

Whether in a death penalty prosecution involving the murder of a prison guard while the defendant was serving a life sentence, the defendant was entitled to the removal of several prospective jurors for cause on the basis that they indicated that they would support a death sentence under circumstances similar to the defendant's.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (See also: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant's Attempt to Seek Treatment—Admission Conditioned on Admission of State's Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

***Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.**

Whether in a death penalty prosecution the trial court erred in removing two jurors for cause on the basis of their stated opposition to the death penalty.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission Conditioned on Admission of State’s Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

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Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process.

Whether in this death penalty prosecution in which the death sentence originally imposed was reversed on appeal and the case was remanded for resentencing, [RCW 10.95.090](#) prohibits the prosecutor from again seeking the death penalty, and if not, whether the prosecutor's discretion to again seek the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution.

No. 88086-7, *State* (respondent) v. *Gregory* (appellant). (*See also*: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor's Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim's Rights—Characterization of Severity of the Crime—Comment on Defendant's Demeanor.](#))

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***Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.**

Whether the sentence of death imposed in this prosecution for aggravated first degree murder is unsupported by the evidence, is the result of passion and prejudice, and is disproportionate to sentences imposed in other cases.

No. 88906-6 *State* (respondent) *v. Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission Conditioned on Admission of State’s Rebuttal Evidence.](#) [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim.

Whether in this death penalty prosecution the death sentence was disproportionate and constituted cruel punishment under article I, section 14 of the Washington Constitution when the defendant lacked a history of violent felonies and killed a single victim.

No. 88086-7, *State* (respondent) v. *Gregory* appellant). (See also: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application](#); [Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.](#))

**Criminal Law—Punishment—Death Penalty—Review—Proportionality—
Finding by State Supreme Court—Right to Jury Trial.**

Whether [RCW 10.95.130\(2\)](#) violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by assigning to the Washington Supreme Court rather than to the jury the task of determining the proportionality of a death sentence.

No. 88086-7, *State* respondent) v. *Gregory* (appellant) (*See also*: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application; Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process; Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof; Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.](#))

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***Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.**

Whether in a death penalty prosecution it was unfairly prejudicial to allow the jury to hear evidence that the defendant was serving a life sentence without the possibility of early release when he killed a prison guard.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission Conditioned on Admission of State’s Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness.

Whether [RCW 10.95.060\(3\)](#) is unconstitutionally vague in allowing the State to present evidence “concerning the facts and circumstances of the murder” at the penalty phase of a death penalty prosecution.

No. 88086-7, *State* (respondent) v. *Gregory* (appellant) (*See also*: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application](#); [Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.](#))

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Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof.

Whether in this death penalty prosecution the trial court erred in declining to excuse for cause a juror who had repeatedly expressed the belief that the defendant would have to prove to the juror that life without early release rather than death was the proper punishment.

No. 88086-7, *State* (respondent) v. *Gregory* (appellant) (*See also*: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application](#); [Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.](#))

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***Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.**

Whether in a death penalty prosecution the trial court correctly instructed the jury that it had to be unanimous in answering “‘yes’ or ‘no’” to the question whether there were not sufficient mitigating circumstances to merit leniency.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission Conditioned on Admission of State’s Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

***Criminal Law—Punishment—Death Penalty— Special Sentencing Procedure—
Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission
Conditioned on Admission of State’s Rebuttal Evidence.**

Whether in the death penalty phase of an aggravated first degree murder prosecution, the trial court erroneously conditioned the defendant’s presentation of mitigation evidence that he had tried to obtain sex offender treatment on the State being allowed to present rebuttal evidence that the defendant was not amenable to treatment.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

***Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—
Notice—Decision to File—Review—Standard of Review—Statutory Provisions—
Constitutionality.**

Whether a prosecutor's decision to file a death penalty notice is reviewable by the trial court on the basis of whether the decision is objectively reasonable, and if it is not reviewable on that basis under Washington's death penalty statute, whether the statute is unconstitutional.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant's Attempt to Seek Treatment—Admission Conditioned on Admission of State's Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

***Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—
Notice—Timing—Decision to File—Basis—Matters Considered—
Investigation—Sufficiency.**

Whether in a death penalty case prosecution the prosecutor's notice of intent to seek the death penalty should have been dismissed on the basis that the notice was filed before arraignment and without adequate consideration of mitigating evidence.

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (See also: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant's Attempt to Seek Treatment—Admission Conditioned on Admission of State's Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.](#))

Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Prosecutor’s Conduct—Misconduct—Argument—“Declare the Truth”—Value of Mitigation Evidence—Comparison With Victim’s Rights—Characterization of Severity of the Crime—Comment on Defendant’s Demeanor.

Whether in this death penalty prosecution the prosecutor engaged in misconduct warranting a new sentencing proceeding by stating during penalty phase closing argument that the jury in its verdict should “speak the truth,” that the mitigation evidence was the “best that could be said” about the defendant, that the defendant had rights while the victim did not, and that the defendant’s crime was “as bad as it gets,” and by commenting on the defendant’s demeanor.

No. 88086-7, *State* (respondent) v. *Gregory* (appellant). (*See also*: [Criminal Law—Punishment—Death Penalty—Eligibility—Arbitrary and Capricious Application](#); [Criminal Law—Punishment—Death Penalty—Reversal on Appeal—New Special Sentencing Proceeding—Statutory Authority—Discretion of Prosecutor—Validity—Cruel and Unusual Punishment—Due Process](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Cruel Punishment—State Constitution—Absence of Violent Criminal Record—Only One Victim](#); [Criminal Law—Punishment—Death Penalty—Review—Proportionality—Finding by State Supreme Court—Right to Jury Trial](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Statutory Provisions—“Facts and Circumstances of Murder”—Vagueness](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Jury—Selection—Disqualification—Misunderstanding of Burden of Proof](#);))

***Criminal Law—Punishment—Death Penalty—Trial—Jury—Deliberations—Instructions—Validity—Standard of Proof—Premeditation.**

Whether, in a first degree premeditated murder case, the court properly instructed the jury on the standard of proof of premeditation by using the pattern instruction found at 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 26.01.01 (3d ed. 2008) (WPIC 26.01.01).

No. 88906-6, *State* (respondent) v. *Scherf* (appellant). (*See also*: [Criminal Law—Confessions—Admission as Evidence—Voluntariness of Confession—Denial of Access to Counsel—Delay in Preliminary Appearance.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Conviction Proneness.](#); [Criminal Law—Punishment—Death Penalty—Jury—Selection—Challenge for Cause—Opposition to Death Penalty—Disqualification—Necessity.](#); [Criminal Law—Punishment—Death Penalty—Review—Evidence—Sufficiency—Passion or Prejudice—Proportionality.](#) [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Evidence—Circumstances of Crime—Defendant Serving Life Sentence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Circumstances—Statutory Query—Instruction—Necessity of Unanimity to Answer “No”—Validity.](#); [Criminal Law—Punishment—Death Penalty—Special Sentencing Procedure—Mitigating Evidence—Defendant’s Attempt to Seek Treatment—Admission Conditioned on Admission of State’s Rebuttal Evidence.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Decision to File—Review—Standard of Review—Statutory Provisions—Constitutionality.](#); [Criminal Law—Punishment—Death Penalty—Special Sentence Procedure—Notice—Timing—Decision to File—Basis—Matters Considered—Investigation—Sufficiency.](#))

***Criminal Law—Punishment—Sentence—Outside Standard Range—Aggravating Circumstances—Gang Activity—Proof—Generalized Gang Evidence—Admissibility—Harmless Error.**

Whether in this prosecution for first degree assault in which the State sought exceptional sentences based intent to benefit a street gang, [RCW 9.94A.535\(3\)\(aa\)](#), the trial court erred in admitting generalized evidence of street gang activity and membership, and if so, whether the error was harmless.

No. 91185-1, *State* (respondent) v. *Ricardo Deleon, Anthony Deleon and Octavio Robledo* (petitioners). (*See also* [Criminal Law—Confessions—Voluntariness—Information Required by Jail Authorities as a Condition for Receiving Safe Housing—Gang Affiliation Documentation—Right of Confrontation—Harmless Error.](#))

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Criminal Law—Review—Costs—Substantially Prevailing Party—Withdrawal of Counsel After Filing *Anders* Brief.

Whether for purposes of awarding costs under [RAP 14.2](#) to the party who “substantially prevailed on review” of a criminal conviction, the State was the prevailing party where the conviction was affirmed after the defendant’s counsel filed a brief and was allowed to withdraw under the procedure outlined in *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

No. 91531-8, *State* (respondent) v. *Stump* (petitioner).

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**Criminal Law—Searches and Seizures—Warrantless Search—Validity—
Abandoned Property —Flight from Stolen Vehicle—Pursuit of Fleeing Suspect—
Search of Cellular Telephone.**

Whether police lawfully searched a criminal defendant’s cellular telephone without a warrant on the basis that the defendant had abandoned the telephone by leaving it in a stolen vehicle when he fled to avoid police apprehension, and the search was conducted only to reach a person on the list of “contacts,” and thereby identify the fleeing defendant.

No. 91532-6, *State* (respondent) *v.* *Samalia* (petitioner).

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**Criminal Law—Trial—Misconduct of Prosecutor—Argument—Witnesses—
Failure to Call—Available Corroborative Witness.**

Whether, in a prosecution for methamphetamine possession, the prosecutor committed misconduct in commenting on the defendant’s failure to call a witness to support his unwitting possession affirmative defense.

No. 91660-8, *State* (petitioner) *v.* *Sundberg* (respondent).

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Deeds of Trust—Defaulting Borrower—Lender Entry into Premises Prior to Foreclosure and Trustee’s Sale—Predefault Agreement Permitting Entry—Validity—Receivership Statute—Exclusivity of Preforeclosure Remedy.

Whether under Washington’s lien theory of mortgages and its ejectment statute, [RCW 7.28.230\(1\)](#), a borrower and a lender may execute a predefault agreement allowing the lender to enter, maintain, and secure the encumbered property before foreclosure and sale, or whether instead Washington’s receivership statute, chapter [7.60 RCW](#), provides the exclusive remedy for lender entry into encumbered property before foreclosure absent postdefault consent of the borrower.

No. 92081-8, *Laura Zamora Jordan* (plaintiff) v. *Nationstar Mortgage, LLC* (defendant).

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***Eminent Domain—Compensation—Litigation Costs—30-Day Settlement Offer—Modification of Scope of Condemnation at Trial—Effect.**

Whether in this eminent domain action in which Sound Transit condemned a parcel of land for an easement, the property owner is entitled to litigation costs under [RCW 8.25.070\(1\)](#) in connection with the trial on just compensation when Sound Transit made an initial 30-day settlement offer but then modified the scope of the easement sought at trial.

No. 91653-5, *Cent. Puget Sound Reg’l Transit Auth.* (respondent) v. *Airport Inv. Co.* (petitioner). (*See also:* [Eminent Domain—Compensation—Proof—Hearsay—Admission of Party Opponent—Out-of-Court Expert Valuation.](#))

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***Eminent Domain—Compensation—Proof—Hearsay—Admission of Party Opponent—Out-of-Court Expert Valuation.**

Whether in an eminent action the trial court properly admitted the property owner's personal belief as to the property's value, derived from an out-of-court expert valuation, as an admission of a party opponent exempt from the hearsay rule, or whether the testimony was inadmissible as conveying an out-of-court expert opinion.

No. 91653-5, *Cent. Puget Sound Reg'l Transit Auth. (respondent) v. Airport Inv. Co. (petitioner)*. (See also: Eminent Domain—Compensation—Litigation Costs—30-Day Settlement Offer—Modification of Scope of Condemnation at Trial—Effect.)

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Employment—Compensation—Damages for Nonpayment of Wages—Attorney Fees—Statutory Provisions—“Action”—What Constitutes—Administrative Appeal of Disciplinary Action.

Whether a city of Seattle employee's successful administrative appeal of a disciplinary action before the city civil service commission, in which the employee recovered back pay, entitled the employee to an award of reasonable attorney fees under [RCW 49.48.030](#), which provides for an award of attorney fees to an employee who recovers wages or salary owed in “any action” against an employer.

No. 91742-6, *Arnold (respondent) v. City of Seattle, d/b/a Human Services Dep't (petitioner)*.

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**Industrial Insurance—Assessments—Premiums—Eligibility—Workers—
Worker or Independent Contractor—Franchisee.**

Whether franchisees of a commercial cleaning services franchisor who personally perform the cleaning services, using the franchisor’s cleaning methods and approved equipment, are “workers” for whom the franchisor must pay industrial insurance premiums and who are not excluded from the purview of the Industrial Insurance Act under [RCW 51.08.195\(3\)](#).

No. 91610-1, *Dep’t of Labor & Indus.*, (respondent) v. *Lyons Enters. Inc., D/B/A Jan-Pro Cleaning Sys.*, (petitioner).

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No. 91777-9, *Lui and Lui* (petitioners) v. *Essex Ins. Co.* (respondents).

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***Judgment—Collateral Estoppel—Applicability—Appellate Decision—
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Whether 2010 legislation that retroactively narrowed the applicability of an exemption from the Washington business and occupation tax in response to *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009), relating to a taxpayer's tax refund claim for the tax periods from January 2000 through April 2006, preserved the collateral estoppel effect of that decision as to the same taxpayer's refund claim for the tax periods from May 2006 through December 2007, and, if not, whether the legislation violated separation of powers principles.

No. 92398-1, *Dot Foods, Inc.*, (respondent/cross-appellant) v. *Dep't of Revenue* (appellant/ cross-respondent). ([See also: Taxation—Business & Occupation Tax—Exemptions—Direct Seller's Representative—Statutes—Amendment—Retroactivity—Validity—Due Process](#)).

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Validity—First Amendment.**

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No. 91934-8, *State* (respondent) v. *K.H.-H.* (petitioner).

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Medical Treatment—Malpractice—Comparative Negligence—Contributory Fault— Failure to Follow Physician’s Advice and Instructions.

Whether a medical provider’s claim that a patient was comparatively negligent in failing to follow his physician’s advice and instructions is a question for the jury, and should not have been dismissed on summary judgment, where the recommended actions allegedly would have led to the discovery of cancer though there was no diagnosis indicating the potential presence of cancer.

No. 91374-9, *David Dunnington and Janet Wilson* (petitioners) v. *Virginia Mason Medical Center* (respondent). ([See also: Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Lost Chance of a Better Outcome—Causation—“But For” or “Substantial Factor” Causation](#)).

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Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Lost Chance of a Better Outcome—Causation—“But For” or “Substantial Factor” Causation

Whether the “but for” or the “substantial factor” standard of causation applies to a claim for loss of chance of a better outcome in a medical malpractice action alleging a physician’s negligence delayed a diagnosis of cancer.

No. 91374-9, *David Dunnington and Janet Wilson* (petitioners) v. *Virginia Mason Medical Center* (respondent). ([See also: Medical Treatment—Malpractice—Comparative Negligence—Contributory Fault— Failure to Follow Physician’s Advice and Instructions](#)).

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Whether holidays and weekends are excluded in calculating the maximum period allowed for a continuance under [RCW 71.05.240\(1\)](#) for a probable cause hearing on a petition for continued detention of a person for involuntary mental health treatment.

No. 91950-0, *In re the Det. of W.C.C.* (*See also:* [Mental Health—Involuntary Commitment—Probable Cause Hearing—Privacy—Use of Initials in Place of Full Name.](#)).

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***Mental Health—Involuntary Commitment—Probable Cause Hearing—
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Whether in connection with a petition for continued detention of a person for involuntary mental health treatment, courts should use the person's initials in place of the person's full name.

No. 91950-0, *In re the Det. of W.C.C.* (*See also:* [Mental Health—Involuntary Commitment—Hearing—Probable Cause Hearing—Timeliness—Continuance—End of Period—Excluded Days](#)).

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Whether in a negligence action against a county stemming from the death or injury of several persons at the hands of a former jail inmate a month after his release from jail, the county may be liable under its “take charge” duty to control the inmate on the basis of its alleged failure to adequately diagnose and treat the inmate for his mental condition while he was incarcerated.

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No. 91932-1, *Centurion Properties III, LLC, et al.* (appellants) v. *Chicago Title Ins. Co.* (respondent).

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No. 91775-2, *N. L. (respondent) v. Bethel School District (petitioner)*.

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**Statutes—Construction— Counties—Joint Self-Insurance Agreement—
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Whether a county risk pool created under chapters [48.62](#) and [39.34 RCW](#) had a duty to defend a county and its employee under a joint self-insurance liability policy, and whether the existence of such a duty to defend is properly analyzed under principles of contract law or principles of insurance law where [RCW 48.01.050](#) provides that two or more local governmental entities that join together to jointly self-insure “are not an ‘insurer’ under this code.”

No. 91154-1, *Wash. Counties Risk Pool, et al. (respondents) v. Clark County, Wash., et al. (petitioners)*. (*See also: Counties—Joint Self-Insurance Agreement Assignments—After Loss—Prohibition*).

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***Taxation—Business & Occupation Tax—Exemptions—Direct Seller’s
Representative—Statutes—Amendment—Retroactivity—Validity—Due Process.**

Whether a 2010 statutory amendment enacted in response to *Dot Foods, Inc. v. Department of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009), narrowing the applicability of the direct seller’s exemption from Washington’s business and occupation tax, may constitutionally be applied retroactively to a pending tax refund claim for tax periods predating the amendment.

No. 92398-1, *Dot Foods, Inc. (respondent/cross-appellant) v. Dep’t of Revenue (appellant/cross-respondent)*. (*See also: Judgment—Collateral Estoppel—Applicability—Appellate Decision—Subsequent Retroactive Legislative Amendment—Pending Tax Refund Claim*).

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Action—Implied Right of Action—Statutorily Created Protection—Legislative Intent— Health—Vulnerable Adult—Abuse or Neglect—Reporting Requirement —Mandated Reporter—Negligence—Summary Judgment—Question of Law or Fact

Whether [RCW 74.34.035](#) implies a cause of action against a mandatory reporter for negligent failure to report suspected abuse or assault of a vulnerable adult and, if so, whether there are issues of fact as to whether a nurse had cause to believe that an assault had occurred based on her patient's report regarding improper administration of morphine to a facility resident who was not the nurse's patient.

No. 91536-9, [Esther Kim, et al., \(petitioners\) v. Alpha Nursing Services, Inc., et al., \(respondents\)](#). (Oral argument 11/12/2015).

[186 Wn. App. 398 \(2015\)](#)

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Conflict of Laws—Limitation of Actions—Foreign Limitation Period—Threshold Inquiry—Conflict in Substantive Law—Necessity.

Whether in a Washington personal injury suit based on an automobile accident that occurred in Idaho, the Court of Appeals erred in holding that the Idaho statute of limitation applies without first determining whether there is a conflict between Idaho and Washington law on the substantive issue involved in the suit, and if so, whether a conflict exists.

No. 91270-0, [Woodward \(petitioner\) v. Taylor \(respondent\)](#). (Oral argument 9/24/2015).

[185 Wn. App. 1 \(2014\)](#)

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**Consumer Protection—Action for Damages—Unfair or Deceptive Conduct—
Right of Action—Scope—Out of State Plaintiff—Washington Corporate
Defendant—Out-of-State Corporate Principal of Washington Corporate
Defendant.**

Whether a plaintiff who is not a Washington resident may sue a Washington corporation under the Washington Consumer Protection Act, [RCW 19.86.010 et seq.](#), for allegedly deceptive acts committed by the corporation as the in-state agent of an out-of-state corporation and, if so, whether the plaintiff may also sue the out-of-state corporation under the Act.

No. 91393-5, *Thornell* (plaintiff) v. *Seattle Serv. Bureau, Inc., et al.* (defendants).
(Oral argument 10/20/2015).

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**Counties—Land Use Controls—Growth Management Act—Local Compliance
With Act—Rural Area Development—Water Resources—Protection—
Sufficiency—Instream Flow Protection—Permit Exempt Groundwater
Withdrawals.**

Whether a Whatcom County ordinance amending the rural element of the county's comprehensive plan and zoning code fails to comply with the Washington Growth Management Act, chapter [36.70A RCW](#), in not adequately taking into account the effect that permit-exempt groundwater withdrawals have on instream flows in the county's rural areas, and if so, whether the entire ordinance is invalid.

No. 91475-3, *Whatcom County* (respondent) v. *Eric Hirst, et al.* (petitioner). (Oral argument 10/20/2015).

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Courts—Jurisdiction—Nonresidents—Due Process—Purposeful Minimum Contacts—Tort Claim—Acts of Foreign Law Enforcement Officer in Washington—Comity.

Whether the Spokane County Superior Court has personal jurisdiction over an Idaho law enforcement officer in an action alleging that the officer committed tortious acts during a traffic stop of an Idaho resident just inside Washington State, and if so, whether the action should nonetheless be tried in Idaho on comity grounds.

No. 91466-4, *Pruczinski, et al. (respondents) v. Allen Ashby, et ux. (petitioners)*. (Oral argument 11/10/2015).

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Courts—Jurisdiction—Nonresidents—Foreign Manufacturer—Fair Play and Substantial Justice—Transaction of Business—Product in Stream of Commerce—Connection With Forum State—Sufficiency.

Whether in an action under the Consumer Protection Act alleging a price-fixing conspiracy in the marketing of cathode ray tubes, defendant nonresident consumer electronics manufacturers had sufficient contacts with Washington to subject them to the personal jurisdiction of Washington courts.

No. 91391-9, *State (respondent) v. LG Electronics, et al. (petitioner)*. (Oral argument 9/24/2015).

[185 Wn. App. 394 \(2015\)](#)

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Criminal Law—Former Jeopardy—Alternative Means of Committing Offense—Separate Charges of Alternative Means—Acquittal of One Charge and Deadlock on Other—Effect—Retrial on Deadlocked Charge.

Whether in a prosecution on two counts of second degree assault based on the same act, one alleging assault by means of use of a deadly weapon and one alleging assault by means of recklessly inflicting substantial bodily harm, the jury's acquittal of the defendant on one of the counts and its deadlock on the other precludes the State from retrying the defendant on the deadlocked count under double jeopardy principles.

No. 91193-2, *State (respondent) v. Fuller (petitioner)*. (Oral argument 10/20/2015).

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Criminal Law—Former Jeopardy—Judgment—Collateral Estoppel—Prosecution for First Degree Murder While Armed With Firearm—Previous Acquittal on Charge of Unlawful Possession of Firearm—Effect.

Whether under collateral estoppel principles as embodied in the constitutional guarantee against double jeopardy, the defendant's prosecution for first degree murder while armed with a firearm violated double jeopardy principles when in a previous bench trial the court found the defendant not guilty of unlawful possession of a firearm based on the same incident.

No. 89706-9, *In re Pers. Restraint of Moi, Mathew W. Moi* (petitioner); *State* (respondent). (Oral argument 9/8/2015).

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Criminal Law—Punishment—Sentence—Credit for Detention—Time Served Before Sentencing—Current Offenses—Existing Detention on Intervening Conviction—Overlapping Credit—Whether Allowed.

Whether in sentencing a defendant on multiple current offenses where the defendant is already serving a sentence imposed on a later-charged offense, the trial court is required under [RCW 9.94A.505\(6\)](#) to give the defendant full presentence jail credit on the current offenses.

No. 91180-1, [State \(respondent\) v. Lewis \(petitioner\)](#). (Oral argument stricken; case to be determined without oral argument.)

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Criminal Law—Punishment—Sentence—Criminal History—“Same Criminal Conduct”—Child Rape and Incest.

Whether a defendant’s convictions for child rape and incest based on the same acts constitute the “same criminal conduct” for offender score purposes.

No. 91366-8, [State \(respondent\) v. Chenoweth \(petitioner\)](#). (Oral argument 11/12/2015)

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Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Persistent Offender Accountability Act—Prior Convictions—Vehicular Manslaughter—California Offense.

Whether a criminal defendant’s prior California conviction for vehicular manslaughter is a “most serious offense” under Washington’s Persistent Offender Accountability Act.

No. 91297-1, *State* (petitioner) v. *Farnsworth* (respondent). (Oral argument 10/22/2015). ([see also Criminal Law—Robbery—First Degree Robbery—Against Financial Institution—Threat—Robbery Note—“Put the Money in the Bag”](#)).

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Criminal Law—Reckless Endangerment—Elements —Creating a Substantial Risk of Death or Serious Injury—Driving While Under the Influence of an Intoxicant—Excessive Speed—Child Passenger.

Whether the State failed to prove the defendant’s driving created a substantial risk of death or serious injury, an element of reckless endangerment under [RCW 9A.36.050](#), where the State presented evidence that the defendant drove at a speed above the posted speed limit with a child passenger while having a blood alcohol concentration over .18.

No. 91623-3, *State* (petitioner) v. *Rich* (respondent). (Oral argument 11/12/2015)

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Criminal Law—Retail Theft—Special Circumstances—Possession of Device Designed to Overcome Security Systems—What Constitutes—Scope—Wire Cutters.

Whether in a prosecution for retail theft with “extenuating circumstances” under former [RCW 9A.56.360\(1\)\(b\)](#) (2006), wire cutters used by the defendant to remove a security device attached to the stolen merchandise constituted “an item, article, implement, or device designed to overcome security systems” within the meaning of the statute.

No. 91457-5, *State (respondent) v. Larson (petitioner)*. (Oral argument 10/22/2015).

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Criminal Law—Robbery—First Degree Robbery—Against Financial Institution—Threat—Robbery Note—“Put the Money in the Bag.”

Whether in a prosecution for first degree robbery of a financial institution, a handwritten note directing a bank teller to put money in a bag without dye packs or tracking devices constituted a threatened use of force, violence, or fear of injury for purposes of the definition of robbery, [RCW 9A.56.190](#).

No. 91297-1, *State (petitioner) v. Farnsworth (respondent)*. (Oral argument 10/22/2015). (*See also* [Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Persistent Offender Accountability Act—Prior Convictions—Vehicular Manslaughter—California Offense](#)).

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Criminal Law—Searches and Seizures—Automobiles—Warrantless Search—Protective Search of Vehicle—Objects in Plain View—Seizure of Firearm.

Whether in the course of stop in which the occupants of a car were ordered out and handcuffed, a police officer, after conducting a “protective sweep” of the car for any other occupants, lawfully reached into the car without a warrant to seize a gun in preparation for towing the car.

No. 90188-1, [State \(respondent\) v. Duncan \(petitioner\)](#). (Oral argument 11/17/2015).

[180 Wn. App. 245 \(2014\)](#) (Published in part)

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Criminal Law—Searches and Seizures—Consent—Entry Into Dwelling—Right to Refuse—Warning—Necessity—Before Entry Made.

Whether in a criminal prosecution in which the defendant gave consent to police officers to enter his home to seize a computer while the officers were still outside his home, the evidence discovered on the computer should have been suppressed because the officers failed to advise the defendant of his right to deny, revoke, or limit consent as required by *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), until after the officers entered the home.

No. 91529-6, [State \(petitioner\) v. Budd \(respondent\)](#). (Oral argument 10/29/2015)

[186 Wn. App. 184 \(2015\)](#)

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Criminal Law—Trial—Joinder or Severance—Codefendant’s Statements—Confrontation Clause—Testimonial or Nontestimonial Statement—Effect—Harmless Error.

Whether under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the trial court in a criminal prosecution erred in admitting a codefendant’s out-of-court statements concerning the defendant’s culpability or in not severing the trials, and if so, whether the error was harmless.

No. 91331-5, [State \(respondent\) v. Wilcoxon \(petitioner\)](#). (Oral argument 9/10/2015).

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Criminal Law—Trial—Presence of Defendant—Right to Be Present—Waiver—Voluntariness—Determination—Presumption Against Waiver—Application—Necessity.

Whether in a criminal prosecution in which the court proceeded with trial in the defendant’s absence after making a preliminary finding that she had voluntarily waived her right to be present by failing to appear, the court upon the defendant’s appearance was required to expressly consider on the record the defendant’s explanation for her absence in light of the presumption against waiver when making its final ruling on whether the defendant waived her right to be present.

No. 91220-3, [State \(respondent\) v. Thurlby \(petitioner\)](#). (Oral argument 9/10/2015).

[184 Wn. App. 918 \(2014\)](#)

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Industrial Insurance—Eligibility—Commission of Felony—Proof—Burden of Proof—Degree of Proof.

Whether in a worker’s challenge to the denial of industrial insurance benefits on the basis that the worker was injured while committing the felony of driving under the influence of an intoxicant, *see* [RCW 51.32.020](#), the Department of Labor and Industries bears the burden of proving that the felony payment bar applies, and if so, whether the standard of proof is by clear, cogent, and convincing evidence.

No. 91357-9, *Dep’t of Labor & Indus.*(petitioner) *v.* *Rowley* (respondent). (Oral argument 10/27/2015).

[185 Wn. App. 154 \(2014\)](#)

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Insurance—Underinsured Motorist—Underinsured Vehicle—“Arise Out of Use” of Underinsured Motor Vehicle—Drive-By Shooting—Intentional Injury.

Whether, for purposes of underinsured motorist automobile insurance coverage, an insured pedestrian’s injuries sustained after being shot by an underinsured driver who momentarily stopped or slowly drove by in his vehicle “arise out of” the driver’s use of his vehicle, and if so, whether coverage exists even if the driver intended harm.

No. 91846-5, *Kroeber* (appellant) *v.* *GEICO Insurance Co.* (respondent). (Oral argument 10/27/2015).

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Judgment—Foreign Judgment—Full Faith and Credit—Domestic Real Property.

Whether, in a judicial foreclosure action, a Washington court determining the validity of a deed of trust that encumbers Washington property is constitutionally required to afford full faith and credit to an Idaho court order that authorized execution of the deed of trust by a conservator.

No. 91283-1, [OneWest Bank, FSB \(petitioner\) v. Erickson \(respondent\)](#). (Oral argument 10/22/2015).

[184 Wash. App. 462 \(2014\)](#)

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Limitation of Actions—Consumer Protection—State Enforcement—Parens Patriae Action—Limitation Period—Exemption—Applicability.

Whether the exemption of the State from any statute of limitations under [RCW 4.16.160](#) applies to an action to enforce the Consumer Protection Act brought by the State as parens patriae pursuant to [RCW 19.86.080\(1\)](#).

No. 91263-7, [State \(respondent\) v. LG Electronics, et al. \(petitioner\)](#). (Oral argument 9/24/2015).

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Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Percentage—Expert Testimony—Necessity.

Whether, to recover damages for lost chance of a better outcome in this professional malpractice lawsuit against a psychiatrist based on harm caused by the psychiatrist's patient, the plaintiff must present expert evidence of the percentage by which the psychiatrist's conduct reduced the likelihood of a better outcome.

No. 91387-1, *Volk, et al.* (respondents/cross petitioners) v. *DeMeerleer, et al.*

(petitioners/cross respondents) (Oral Argument 11/17/2015). (*See also:*

[Negligence—Duty—Protection of Others—Criminal Acts of Third Persons—Special Relationship—Psychiatry—Patient-Caused Injuries—Duty to Prevent—Scope.](#)).

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Mental Health—Involuntary Commitment—Inflicting or Attempting to Inflict Serious Physical Harm—180-Day Commitment Period—Renewal—Statute—Constitutionality.

Whether [RCW 71.05.320\(3\)\(c\)\(ii\)](#), which provides for a 180-day extension of an involuntary civil commitment of a person incompetent to stand trial for violent offenses if the State presents prima facie evidence that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood of acts similar to the charged criminal behavior, violates the United States or Washington constitutions.

No. 90570-3, *In re Detention of M.W. & W. D.* (petitioner) (Oral argument 11/10/2015).

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Mental Health—Involuntary Commitment—Sexually Violent Predators—Petition—Statutory Provisions—Persons Subject to Commitment Petition—Prior Offense—Juvenile Offense—Subsequent Release from Total Confinement.

Whether [RCW 71.09.030\(1\)](#) authorizes the State to file a petition seeking civil commitment as a sexually violent predator of a person who was adjudicated guilty of committing a sexually violent offense as a juvenile and was subsequently released from total confinement.

No. 91385-4, *In re Det. of Anderson John C. Anderson* (petitioner); *State* (respondent). (Oral argument 9/17/2015). (*See also*: [Mental Health—Involuntary Commitment—Sexually Violent Predators—Recent Overt Act—What Constitutes—Consensual Sexual Relations with Fellow Mental Health Patients](#)).

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Mental Health—Involuntary Commitment—Sexually Violent Predators—Recent Overt Act—What Constitutes—Consensual Sexual Relations with Fellow Mental Health Patients.

Whether in this petition to civilly commit a person as a sexually violent predator, the person’s noncriminal consensual sexual relationships with fellow patients at a state mental hospital more than 10 years before the commitment trial were “recent overt acts” for purposes of proving that the person is a sexually violent predator.

No. 91385-4, *In re Det. of Anderson, John C. Anderson* (petitioner); *State* (respondent). (Oral argument 9/17/2015). (*See also*: [Mental Health—Involuntary Commitment—Sexually Violent Predators—Petition—Statutory Provisions—Persons Subject to Commitment Petition—Prior Offense—Juvenile Offense—Subsequent Release from Total Confinement.](#)).

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Negligence—Duty—Protection of Others—Criminal Acts of Third Persons—Special Relationship—Psychiatry—Patient-Caused Injuries—Duty to Prevent—Scope.

Whether in this action for professional malpractice against a psychiatrist, the psychiatrist owed a duty of care to persons murdered by the psychiatrist's patient where the patient had expressed homicidal ideas but never specifically expressed intent to harm the victims.

No. 91387-1, *Volk, et al.* (respondents/cross petitioners) *v.* *DeMeerleer, et al.* (petitioners/cross respondents) (Oral argument 11/17/2015). ([See also: Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Percentage—Expert Testimony—Necessity](#)).

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Negligence—Municipal Corporations—Streets—Maintenance and Repair—Duty—Failure to Provide Safe Roadway—Obstruction of View at Intersection—Off Roadway Obstruction.

Whether King County's duty to maintain reasonably safe roads obligated it to remove brush that obscured the line of sight at an intersection but did not encroach onto the roadway.

No. 91555-5, [Wuthrich](#) (petitioner) *v.* [King County](#) (respondent). (Oral argument 11/10/2015).

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Open Government—Public Disclosure—What Constitutes—Call Log—Text Messages—Personal Cellular Telephone—Device Used for Both Work and Personal Communications—Exemptions—Files Maintained for Employees—Right to Privacy.

Whether [RCW 4.24.550](#), which governs the type of sex offender records that may be disclosed to the public and the circumstances under which they may be disclosed, is an “other statute” under [RCW 42.56.070\(1\)](#) of the Public Record Act, as a result of which sex offender registration forms are exempt from the broader disclosure requirements of the act.

No. 90413-8, *John Doe A., et al.* (respondents) v. *Wash. State Patrol, et al.* (appellants). (Oral argument 9/17/2015).

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Personal Restraint—Petition—Timeliness—Statutory Limits—Exceptions—Significant Change in Law—Appellate Decision—Mulholland Case.

Whether the decision in *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), holding that sentencing courts may impose concurrent sentences for multiple serious violent felonies as a form of exceptional sentence below the standard range, constitutes a “significant change in the law” exempting a collateral challenge to a criminal judgment from the one-year time limit on collateral relief pursuant to [RCW 10.73.100\(6\)](#).

No. 91065-1, *State* (petitioner) v. *Miller* (respondent). (Oral argument 9/10/2015).

[181 Wn. App. 201 \(2014\)](#)

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**Process—Service —Foreign Party—Hague Convention—Compliance—
Sufficiency of Personal Service.**

Whether personal service on a Norwegian citizen at her residence in Norway was adequate to effect service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the alternative service provisions of [CR 4\(i\)\(1\)](#).

No. 91536-9, *Esther Kim, et al.*, (petitioners) *v. Alpha Nursing & Services, Inc., et al.*, (respondents). (Oral argument 11/12/2015).

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**Statutes—Initiatives—Local Initiatives—Validity—Predetermination—
Standing—Personal Harm—Potential Litigation.**

Whether a group of plaintiffs opposed to a proposed local initiative, which includes Spokane County, have standing to bring a pre-election challenge to the initiative where plaintiffs would be exposed to litigation if the measure passes.

No. 91551-2, *Spokane Entrepreneurial Ctr., et al.* (petitioners) *v. Spokane Moves to Amend the Const., et al.* (respondents). (Oral argument 11/10/2015)

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**Vendor and Purchaser—Title—Title Insurance—Later Discovered
Encumbrance—Damages—Diminution in Value—Tender by Insurer—Breach of
Contract Action Against Insurer—Jury Finding of No Breach and No Award of
Damages.**

Whether in a breach of contract lawsuit against a title insurance company for diminished value of land due to a previously undiscovered easement, the jury properly found that the insurer did not breach the policy and thus awarded the insured nothing, even though it was undisputed that the insured suffered a covered loss and the insurer had previously tendered payment under the policy.

No. 91301-3, *Millies, et ux. (petitioner) v. LandAmerica Transnation, et al. (respondent)*. (Oral argument 10/27/2015).

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**Wills—Contest—Undue Influence—Presumption—Rebuttal—Proof—
Sufficiency.**

Whether in an action contesting the validity of a will in which the elderly testator left her entire estate to nonfamily members and disinherited family members, the defenders of the will produced sufficient evidence to rebut a presumption of undue influence, and if so, whether the trial court improperly relied solely on a presumption of undue influence to invalidate the will.

No. 91488-5, *In re the Estate of Eva Johanna Rova Barnes, Deceased* (Oral argument 11/17/2015).

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Witnesses—Privileges—Attorney-Client Privilege—Scope—School District Client—Former Nonparty Employees.

Whether in a personal injury action brought by a former high school football player against a school district, defense counsel's communications with former district coaches not named as defendants are protected by the attorney-client privilege.

No. 90194-5, *Newman, et al.* (respondents) v. *Highland Sch. Dist.*
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